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No. 85-1129

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

PAUL E. JOHNSON,

Petitioner,

v.

TRANSPORTATION AGENCY,
SANTA CLARA COUNTY CALIFORNIA, and
SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 715,

Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PETITIONER'S BRIEF

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QUESTION PRESENTED

May a public employer lawfully promote a less-qualified female candidate over a more-qualified male employee allegedly pursuant to an affirmative action plan adopted solely to eliminate a statistical disparity in the work force, unrelated to sex discrimination?

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OPINIONS BELOW

The opinion of which review is sought is *Johnson v. Transportation Agency, Santa Clara County, California*, 748 F.2d 1308 (9th Cir. 1984), *modified and reh'g denied*, 770 F.2d 752 (9th Cir. 1985) (Pet. App. 17a-52a). The District Court's judgment, findings of fact, and conclusions of law are unpublished. (Pet. App. 1a-16a).

JURISDICTION

The Ninth Circuit entered judgment against Petitioner on December 4, 1984. A Petition for Rehearing was denied on September 5, 1985. On November 25, 1985, the Honorable William H. Rehnquist extended the time for filing the Petition for Writ of Certiorari to and including January 3, 1986. The Petition was filed on December 31, 1985, and this Court granted Certiorari on July 7, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action is based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982). The applicable provision states in part:

§ 2000e-2. Discrimination because of race, color, religion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C. § 2000e-2(a)(1) (1983).

STATEMENT OF FACTS

A. Facts and Background

On March 20, 1981, the Petitioner Paul E. Johnson filed suit against his employer, the Respondent Santa Clara County Transportation Agency (hereinafter the "Agency"). Petitioner complained that the Agency discriminated against him on account of his sex in denying him a promotion to the position of Road Dispatcher, instead giving the position to a woman even though Petitioner was selected as the best qualified candidate for the promotion. J.A. 5.

In December, 1979, Petitioner, then a Road Maintenance Worker II for the Agency, applied for the promotion to Road Dispatcher. A Road Dispatcher assigns crews, equipment, and materials to road maintenance jobs and maintains the records relating to each of these areas. The job requires a working knowledge of personnel, equipment, materials, and the various roads maintained by the County. J.A. 23. The position is part of the classified

service of the Agency's work force and is under the County's Merit System Rules. RT, Vol. I, 16:15-18.[1]

Petitioner applied for the position of Road Dispatcher in 1974 and placed second on the eligibility list, after Ronald Neals who was promoted. When he failed to be promoted, Petitioner requested and received a voluntary demotion from Road Yard Clerk II to Road Maintenance Worker, to increase his opportunities to gain experience for future promotion within the Agency.[2] RT, Vol. I, 127:13-20, 128:20-25, 129:1-11. The next vacancy occurred in 1979, when Neals was promoted. Petitioner had the qualifications and experience required for the position. Further, he worked out of class[3] full-time, from September of 1979 until June of 1980, as a Road Dispatcher in the position for which the vacancy existed. RT, Vol. I, 130:2-13.

Eight other Agency employees, including Diane Joyce, also a Road Maintenance Worker II, applied for the position.[4] Joyce too had applied for the position of

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[1]The Reporter's Transcript is cited herein as RT, followed by the volume number, page and line(s).

[2]Petitioner started working for the Agency in 1967, after seventeen years with Pacific Cement and Aggregate Co., where he held the position of dispatcher for the first seven years, and dispatcher and supervisor thereafter. RT, Vol. I, 126:3-11. He went to work for the Agency rather than accept a promotion that would have entailed a move to Oakland, California. RT, Vol. I, 126:12-15.

[3]The term "work out of class" means that an employee is assigned to a position and is paid at a higher rate of compensation for the work performed. RT, Vol. I, 113:13:18.

[4]Joyce had worked as a Road Dispatcher for two weeks filling in at the East Yard. RT, Vol. I, 94:4-6. Like Petitioner, RT, Vol. I, 127:6-9, she "sat within proximity of the Road Dispatcher for many years." RT, Vol. I, 94:9-12. Joyce also filled in for a half an hour during lunch hours. RT, Vol. I, 103:11-14.

Road Dispatcher in 1974, but did not go through the selection process because she did not have the required experience or qualifications. RT, Vol. I, 96:12-24. By 1979, Joyce had gained the experience necessary to apply.

The County Personnel Department held the first oral interviews in April, 1980. Only seven of the nine candidates interviewed received the required score of seventy or above on the oral examination. J.A. 15. After the interview, William Kinnear was ranked first, with a score of 80, followed by Petitioner and Walter Mitchell who tied with a score of 75. The remaining candidates were ranked as follows: Joyce with a score of 72.5 rounded up to 73,[5] Richard Jadrich (71), Ronald McNay (71), and Albert Silva (70). J.A. 26. These seven individuals were placed on the civil service eligible list, J.A. 15, 26, and participated in a second oral interview. J.A. 16.

The second oral examination was conducted by three Agency Supervisors: Clyde Davis, Glen Foreman, and James Baldanzi. RT, Vol. II, 150:11-13, 162:10-13, 163: 24-25, 164:1-2.[6] All applicants were asked the same ques-

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[5]J.A. 16.

[6]The questions were:

1. Why do you want to be a Road Dispatcher?

2. What do you perceive a Dispatcher's job to be?

3. As you know the Dispatcher's job involves work indoors. How will you adjust to indoor work?

(Handwritten 4) What experience do you have that you feel qualifies you for this position?

(Typewritten 4) A citizen calls in says there is a tree down. What other information would you need to handle this complaint successfully?

(Continued on next page)

tions, and the candidates were evaluated after all of the interviews were completed. RT, Vol. II, 164:13-25, 164: 1-3, 165:1-3, 166:6-11. Under this process, all candidates were treated equally. RT, Vol. II, 164:13-25, 165:1-3.

Following the second interview, Petitioner was ranked first and unanimously recommended as the best qualified for the promotion. RT, Vol. II, 165:23-25, 166:1-22.[7] Jadrich was ranked second and Joyce was ranked third. RT, Vol. I, 93:1-3.

Before the second interviews were completed, Joyce contacted the County's Women's Coordinator, Helena Lee, because she, Joyce, had heard rumors that Petitioner had the promotion sewn up, and because she believed that the process would be unfair to her due to past incidents with Baldanzi and Foreman. J.A. 16; RT, Vol. I, 89:3-11, 91:17-25, 92:1-6, 101:15-24. Lee contacted Victor Morton, the Agency's Affirmative Action Coordinator, about Joyce's application. J.A. 16. Morton, in turn, contacted James Graebner, the Director of the Transportation Agency, and recommended that Joyce be promoted because she was the only applicant within a "protected class" as defined by the Agency's affirmative action plan. Pet. App. 19a.

(Continued from previous page)

5. How would you handle a call from an irate citizen?

6. A citizen living in the City of San Jose's jurisdiction calls with a complaint about a street that is within the City. He has called the City, and they say it is a County problem. How would you handle the problem?

RT, Vol. II, 157:2-3, 5-23.

[7]Kinnear and Mitchell, who ranked first and second respectively after the first interview, were ranked after Joyce following the second interview.

The Agency's affirmative action plan,[8] effective December 18, 1978, was adopted "to attain an agency work force whose composition reflects the ethnic and sexual make-up of the area work force." J.A. 34. The plan identified certain "protected groups" and then compared the statistical representation of these groups in the area work force to the agency as a whole[9] and in the EEOC job categories,[10] and established that the Agency will work toward achieving balance.

For women, the goal was 36.4% female representation not only in the Agency work force as a whole, but in all EEOC job categories and in each of the County's 118 job classifications so that female representation approximated the distribution of women in the Santa Clara County work

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[8]The Agency affirmative action plan incorporates and implements the Santa Clara County Equal Opportunity Policy, which is the County's affirmative action plan. J.A. 33.

[9]The Agency plan shows that the "goal" is to achieve a balance of 63.6% male representation and 36.4% female representation. In addition, the plan sets the racial goals as 79.2% White, 1.6% Black, 14.8% Hispanic, 2.3% Asian, 0.4% American Indian and 0.6% Filipino. These same "goals" are repeated in the 1979 County plan, J.A. 121, and in the 1982 plan introduced after trial. Supplemental Excerpt of Record 191. Although minority representation exceeded the goals set for the Agency as a whole, minorities were still considered protected groups until the Agency achieved the identified percentage of representation in each of the job categories. J.A. 52-53.

[10]EEOC job categories include Officials and Administrators, Professionals, Technicians, Para-Professionals, Office and Clerical, Skilled Craft Workers and, Service and Maintenance. J.A. 48.

force. J.A. 54.[11] In addition, "[t]he goals established for females and individual ethnic minority groups include attainment of equitable representation of minority women within each group." J.A. 55. Before Joyce was promoted, there were no women among the 238 employees classified in the Skilled Craft category. J.A. 52.

No Agency act, practice, or process was identified in the plan as causing the disparity in percentage of women in the Agency's work force compared to the percentage of women in the area work force. Graebner, the Director of the Agency, testified that he was not aware of any past or present practices or policies which discriminated against women. RT, Vol. I, 39:10-16.

The plan stated that the statistical disparity between the percentage of women employed by the Agency and women employed in the County required aggressive, affirmative action in all phases of employment until balance is achieved. J.A. 54. The plan instructed that it is not sufficient to merely prohibit discrimination and that affirmative steps must be taken so that the work force is in balance. J.A. 31. The plan did note that external factors have hindered achievement of the goal of 36.4% female representation. J.A. 55-57.[12]

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[11]"Of the 1,252 employees, 281 or 22.4% were women, significantly falling short of the 36.4% ratio of women in the area work force (1970 census)." J.A. 45. The actual representation of women, 22.4% was a significant improvement over the 1973 figure of 8.5% when the County Department of Public Works was reorganized into the Transportation Agency. J.A. 45

[12]Janet Thomas, the Agency Personnel Officer, testified that she believed that the goal was not realistic because of a lack of interest by women. RT, Vol. II, 263:6-20, 272:12-20.

Pursuant to the affirmative action plan, the promotion was awarded to Joyce in June of 1980. Petitioner learned that he would have received the promotion but for the intervention of the Affirmative Action Director, who wanted to promote Joyce so that the numbers would show that a woman was employed in the Skilled Craft category. RT, Vol. II, 281:24-25, 282:1-4.[13] Petitioner filed a complaint with the Equal Employment Opportunity Commission, alleging that the Agency discriminated against him on the basis of sex. J.A. 9. He received a right to sue letter on March 10, 1981 and filed suit in the United States District Court for the Northern District of California on March 20, 1981. J.A. 5.

B. Decisions Below

1. Decision of the District Court

The District Court found as a matter of fact[14] that Petitioner was the best qualified candidate and that "[b]ut for plaintiff's sex, male, he would have been promoted to the position of Road Dispatcher." Pet. App. 13a. "But for Diane Joyce's sex, female, she would not have been appointed to the position of Road Dispatcher." Pet. App. 13a. In addition, the District Court determined that "[t]he Transportation Agency has not discriminated in

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[13]Humbert Anthony Di Basilio testified that he could only remember one other instance in his twenty-six years with the Agency that a promotion recommendation was not followed. RT, Vol. II, 189:22-25. Graebner testified that he had never before stepped in and made a final decision as to a promotion within the Road Operations Division. RT, Vol. I, 15:24-25, 16:1-2.

[14]A bench trial was held on May 7 and 12, 1982.

the past, and does not discriminate in the present against women in regard to employment opportunities in general and promotions in particular." *Id.* [15]

The District Court found as a matter of fact that the rationale for Joyce's appointment was the Agency's affirmative action plan. However, "[t]he Affirmative Action Plan had no end date or other provision which would have the effect of ending preferential treatment to women." Pet. App. 13a. Nor did the 1979 County affirmative action plan limit the Agency plan.

> There is nothing within the County Plan, Ex.2, which is consistent with any temporary remedial purposes. Rather, it contains 82 full pages of instructions pertaining to the annual, ongoing and apparently perpetual maintenance of an Affirmative Action Plan.
>
> In like manner, the provisions of the Agency Plan, Ex. 1, reveal no discrete time period or ultimate goal to be accomplished within a reasonable time from which the Court can infer that the plan is temporary and remedial, as distinguished from ongoing and designed to maintain balanced employment of persons in categories designed to be protected under the plan.

Pet. App. 8a. The District Court determined that "[t]he defendant's refusal to promote plaintiff to the position of Road Dispatcher was in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* as amended."

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[15]The District Court found that the Agency's interview procedures were fair and reasonable. Pet. App. 13a. This has not been disputed.

Pet. App. 14a.[16] The District Court ordered that Petitioner be promoted to the position of Road Dispatcher, and receive all forms of compensation and benefits as a result of the discriminatory failure to appoint him to the position.[17]

The Agency filed a motion for reconsideration before the District Court, arguing that the District Court had

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[16]As stated by the District Court:

> 5. The Affirmative Action Plans of the County Transportation Agency and the County of Santa Clara did not justify the failure to promote plaintiff to the position of Road Dispatcher. The defendant has failed to demonstrate that either or both of the plans are a temporary measure intended to eliminate a manifest imbalance in the work force in the Transportation Agency, but instead, were and are interpreted in such a fashion so as to attempt to maintain an ongoing balance.
>
> 6. The defendant has failed to demonstrate that the Affirmative Action Plan of the Transportation Agency will end or be modified in any way at any point in time or when the defendant's work force composition as a whole, by department, by EEOC category or defendant's major job classification reaches a certain number of percentage of women.

Pet. App. 14a.

[17]Petitioner was appointed to the position of Road Dispatcher on May 22, 1983, after he sought an enforcement order from the District Court. Order of 5-5-83, District Court Docket Entry 71. He took an early retirement from the Agency after Rehearing was denied by the Ninth Circuit. He has received a back pay award of $6,799.28, to and including December 19, 1982, but has not received the differential in pay he would have earned from December 20, 1982 to May 21, 1983. Further, no pension contributions were made from the back pay award or for the period from December 19, 1982 until the Agency actually appointed him to the position on May 22, 1983.

made several errors of fact.[18] In particular, the Agency argued that the enactment of a new plan, effective in 1982 and submitted after trial, was evidence that the plan was not permanent but instead set yearly goals based on annual revisions. The agency also argued that the 1974 promotional announcement, phrased in gender terms, was evidence of past discrimination.

2. Decision of the Ninth Circuit

On appeal to the Ninth Circuit, the Agency argued that the statistics contained in the plan, buttressed by the testimony of Joyce as to the 1974 promotional announcement and the testimony that Baldanzi, a Roads Supervisor, viewed Joyce as a "skirt-wearing, rebel-rouser" who was not a lady, constituted evidence of patterns of discrimination against women sufficient to justify the adoption of the Agency's plan.[19] The Agency also argued that the plan in effect at the time of trial "was a 1-year plan effective January 1, 1982" that contained yearly employment goals rather than quotas, which

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[18]The Service Employees International Union, Local 715 (SEIU) sought intervention as a defendant after trial in order to protect Joyce's job. J.A. 145. The District Court granted SEIU's motion for the limited purpose of arguing the motion for new trial and appeal, if taken by the Transportation Agency. See Order of 10-25-83, District Court Docket Entry 58.

[19]The District Court found that Baldanzi's attitude was not adequate proof of historical justification to adopt the plan. Pet. App. 9a.

showed that the District Court erred in finding that the plan was "permanent and intended to maintain balance." Ninth Circuit Docket, June 20, 1983.

Judges Fletcher and Ferguson voted to reverse the District Court, holding that "the District Court misapprehended the requirements for a bona fide affirmative action plan." Pet. App. 18a. The court held that "the District Court adopted an overly restrictive view" of the test set forth in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).[20]

The court did not disturb most of the District Court's findings of fact, including the finding that the Agency had not discriminated in the past. However, the Ninth Circuit did reverse the District Court's finding that the program was "permanent and designed to maintain a particular balance," without declaring that the District Court's finding was clearly erroneous. Pet. App. 20a.

Instead, the Ninth Circuit determined that the plan was not intended to be permanent. "[W]hile the Agency plan contains no date certain or other express statement of fixed duration, it also contains no statement that it is in-

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[20]The Court of Appeals questioned whether the District Court had inappropriately placed the burden of persuasion on the employer, citing the Supreme Court's decision in *McDonnell Douglas v. Green*, 411 U.S. 792 (1972). However, the Court did not reach a decision on this issue, holding that the employer had met the higher burden imposed by *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

tended to be permanent." Pet. App. 23a. "[T]he entire focus of the plan is on 'attaining,' rather than maintaining, balance." *Id.* Thus, "[u]nlike the District Court, we believe that this emphasis upon the 'attainment' of a representative work force does 'have the effect of ending preferential treatment to women' once parity is achieved." Pet. App. 24a. The Court concluded:

> Plans like this one are usually voluntarily adopted by employees [sic] who wish to express and act upon their commitment to social justice. They should not be rigidly interpreted so as to make their validity depend on technicalities in drafting. To do so would only discourage their adoption and encourage litigation. The District Court's assumption that *Weber* requires an expressed date certain for termination or some other express provision that would trigger the end of an affirmative action plan was erroneous. . . . Undoubtedly, a plan must end when its remedial function has been served. The fact that the plan must end, however, does not necessitate the inclusion of an explicit ending provision.

Pet. App. 24-25a.

The Ninth Circuit declared that an employer need not "show its own history of purposeful discrimination. Instead, a plan is sufficiently remedial if it is based upon "a conspicuous imbalance in its work force." Pet. App. 26a. "Statistics are extremely useful in showing a conspicuous work force imbalance. We note particularly the difficulty that may confront an employer whose plan is intended to remedy discrimination resulting from societal norms." Thus, because not one of the skilled craft positions was filled by a woman and "strong social pressures weigh against their participation," the promotion of Joyce aptly served the remedial purpose of the affirmative action plan. *Id.*

Finally, the court determined that the application of the affirmative action plan did not serve as an absolute bar to the advancement of other employees nor did it unnecessarily trammel their interests. Pet. App. 28a.

> While the Agency plan does not establish specific programs for recruitment, hiring, training, or promotion, it does lay a solid foundation for affirmative action. . . . The import of the plan, as with any lawful affirmative action plan, is to give preference to members of underrepresented groups. The plan does not indicate, however, that other employees will be barred or that their interest will be unnecessarily infringed.

Pet. App. 28a. The court rejected the view that the selection of Joyce barred Petitioner from the promotion.

> The instant case differs markedly from *Weber* and *LaRiviere* in that it does not involve the admission of numerous applicants to a training program. Rather, it concerns the selection of one applicant for a single opening. When there is but one opening, the selection of one candidate will necessarily result in exclusion of all others. Unless we are shown a distinct pattern of exclusion of non-minority candidates from such positions, we cannot conclude that a single employment decision serves as a bar or unnecessarily trammels the interests of other employees.

Pet. App. 28-29a. Accordingly, the Court of Appeals held that the plan "was necessary and lawful, within the guidelines of *Weber*, to remedy longstanding imbalances in the work force." Pet. App. 29a.

Judge Wallace concurred in the reversal of the District Court's decision, but dissented from the majority's reasoning. He concluded that the case should have been vacated

and remanded because the District Court failed to allocate properly the evidentiary burdens between the parties and to make sufficiently detailed findings of fact.

Petitioner filed for Rehearing and Suggested that Rehearing be *en banc,* because the court had ignored the District Court's finding that the Agency did not discriminate against women in the past nor does it discriminate at present, and thus the plan was not *bona fide.* Second, Johnson argued that the Ninth Circuit applied a *de novo* standard of review to the District Court's finding of fact that the plan was permanent.

The Ninth Circuit denied the Petition for Rehearing on September 5, 1985. In amendments to their earlier opinion, Judges Fletcher and Ferguson stated that "the District Court's factual finding of no past or present discrimination against women by this employer is irrelevant to the issue of the validity of the affirmative action plan." Pet. App. 49a. Further, the court noted that "were Ms. Joyce the plaintiff here, the job having gone to Mr. Johnson, the statistics would make a prima facie case of discrimination." Pet. App. 50a.

In his amended opinion, Judge Wallace stated that the majority's decision conflicted with the Seventh Circuit's decision in *Janowiak v. Corporate City of South Bend,* 750 F.2d 557 (7th Cir. 1984), as well as the Supreme Court's decision in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), which hold "that a showing of past discrimination must be made." Pet. App. 52a. Further, to the "extent that the majority opinion holds

that a mere statistical disparity suffices to show that a job category was 'traditionally segregated,' it is contrary to both *Weber* and *Janowiak*." Pet. App. 52a.

SUMMARY OF ARGUMENT

1. A voluntary affirmative action plan by a public employer must be reviewed under the Fourteenth Amendment's strict scrutiny standard even though Petitioner only claims violation under Title VII. The use of strict scrutiny as applied by this Court in *Wygant v. Jackson Board of Education*, 54 U.S.L.W. 4479 (U.S. May 19, 1986), (holding that voluntary affirmative action plan by a public employer that affords race conscious remedies is to be reviewed under strict scrutiny), would avoid the anomalous result of invalidating a race based voluntary affirmative action plan but possibly upholding that same plan as it applies to sex-based classifications. Even though this case concerns a sex-based classification, it should be subject to strict scrutiny because neither Title VII nor the Fourteenth Amendment countenance discrimination and any exception to that principle established by this Court should be very narrow.

2. From the outset, the Agency's plan lacked any remedial purpose that justified denying Petitioner his promotion on account of his sex. Affirmative action programs adopted solely to remedy societal discrimination are impermissible. *Wygant v. Jackson Board of Education*, at 4482. The District Court, in rejecting statistical disparity as the sole justification for the plan, expressly found that the Agency had never engaged in discrimination

and does not now engage in discrimination, Pet. App. 13a, and the Court of Appeals never disturbed that finding of fact. Pet. App. 49a.

3. Even if this plan met the compelling state interest criteria by having a legitimate remedial purpose, it is also invalid because it was not narrowly tailored in any material respect to avoid unnecessarily trammeling Petitioner's individual rights. The plan allocated an across the board employment preference to members of the protected classes (women, minorities, and the handicapped) for each job in the Agency. The application of the preference to promotions, when coupled with the low turnover and lack of any new positions in the Roads Division of the Agency, meant that affirmative action would always bar Petitioner from advancement, when competing with an employee who is a member of a protected class. Petitioner had worked for the Agency for 13 years and had worked toward this promotion for 5 years. He was indisputably the best qualified and lost the promotion solely because the competing employee was a woman and the Agency Director wanted to meet his numerical affirmative action goals.

4. While Petitioner does not believe that the case of *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), applies to this case, because that case was limited to a private employer, the Agency's plan did not even meet the guidelines set forth in *Weber*. The plan lacked any remedial purpose other than to correct societal attitudes. The unrealistic nature of the employment goal for women, coupled with the low turnover and lack of new positions, meant that Petitioner would always be barred from promotion when competing with an employee who was protected under the affirmative action plan. It clearly tram-

meled Petitioner's individual rights by denying him the promotion and operating to deny him future advancement. It also lacked any end date and was intended to maintain the ethnic and sexual make up of the area's work force.

5. Just as *Weber* does not apply because the Agency is a public employer, the rules governing the allocation of burdens of proof and persuasion set forth in *McDonnell Douglas v. Green,* 411 U.S. 792 (1973) also should not apply to this case. *McDonnell Douglas* addressed the problems of proof when there was no direct evidence of intent to discriminate and the employer asserted that it had a nondiscriminatory reason for not hiring the plaintiff. Here, the Agency admitted that Petitioner was not promoted because he was a man and advanced the affirmative action plan as its defense. When an affirmative action plan is used as an affirmative defense, the employer should bear the burden of proof as to its validity. In this case, it makes no difference how the burdens of proof are allocated because the record establishes that Petitioner proved that he was the victim of discrimination on account of his sex and that the affirmative action plan is invalid under the *Weber* guidelines or under the Fourteenth Amendment's standard of review, as argued to this Court.

ARGUMENT

An affirmative action plan allows intentional discrimination on account of race, color, religion, sex or national origin, but only if the affirmative action plan serves a legitimate remedial purpose and it is narrowly tailored so as not to impose disproportionate burdens on nonminority employees that unnecessarily trammel their individual rights.

The Respondent's affirmative action plan, which cost Petitioner his promotion, had no legitimate remedial purpose. The statistical disparity between the percentage of women employed by the Agency and the percentage of women in the area wide work force, standing alone, and without evidence or a claim of past or present discrimination, did not justify the adoption of this discriminatory plan. Without any evidence of past or present discrimination the affirmative action plan had no lawful remedial purpose, was not "bona fide," and cannot excuse the Agency's intentional act of discrimination against Petitioner.

Further, even if some remedial action were justified, it must be narrowly tailored, taking into account the less restrictive alternatives. The plan was not limited to less restrictive alternatives and promoting Joyce imposed disproportionate harm on Petitioner and violated his individual right not to suffer sex-based discrimination. For these reasons, and as argued more fully below, Petitioner asks this Court to reverse the decision of the Court of Appeals.

I. UNDER TITLE VII A VOLUNTARY AFFIRMATIVE ACTION PLAN BY A PUBLIC EMPLOYER MUST ALSO COMPLY WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Although Petitioner only seeks relief under Title VII, the Agency is a public employer and its voluntary affirmative action plan must be analyzed under the Fourteenth Amendment, rather than the guidelines of *United Steelworkers of America v. Weber,* 443 U.S. at 200, which apply only to private employers. This is consistent with the

legislative history of Title VII's extension to state employers by operation of § 5 of the Fourteenth Amendment.[21] *See also Regents of the University of California v. Bakke,* 438 U.S. 265, 287 (1978) (holding that Title VI proscribed racial classifications that also violated the Equal Protection Clause of the Fourteenth Amendment or the Fifth Amendment); *Local No. 93 v. City of Cleveland,* 54 U.S.L.W. 5005, 5013 (U.S. June 24, 1986) (O'Connor, J., concurring) (race conscious relief in a consent decree by a public employer must be consistent with Fourteenth Amendment).

This Court has not decided what constraints might apply to a public employer's voluntary affirmative action plan under Title VII.[22] However,

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[21]The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination.

Subcommittee on Labor of the Committee on Labor and Public Welfare of the United States Senate, *Legislative History of the Equal Employment Opportunity Act of 1972, (H.R. 1746, P.L. 92-261) Amending Title VII of the Civil Rights of 1964* 79 (November 1972) (hereinafter *Legislative History*).

[22]This issue was specifically reserved in *United Steelworkers of America v. Weber,* 443 U.S. 193, 200 (1979). "We emphasize at the outset the narrowness of our inquiry. Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment."

> [w]hen a state employer claims that arguably discriminatory conduct on its part is nonetheless authorized by Title VII, the claim of such statutory authorization must be considered in light of the prohibitions of the Fourteenth Amendment. . . . [A]s always the statute must be read with the presumption that Congress did not intend to authorize conduct that is prohibited by the Constitution.

Bushey v. New York State Civil Service Commission, 105 S. Ct. 803, 806 (1985) (Rehnquist, J., dissenting from denial of certiorari) *citing NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 500-01 (1979).[23]

In *Wygant v. Jackson Board of Education,* 54 U.S.L.W. 4479, 4482 (U.S. May 19, 1986), a case decided under the Fourteenth Amendment, this Court expressly declined to apply *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979) in considering the validity of a public employer's voluntary affirmative action plan that used race conscious remedies.[24] Instead, the Court applied the strict

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[23]The only court to address the issue applied a "heightened scrutiny" to invalidate a public employer voluntary affirmative action plan before this Court's decision in *Wygant. Janowiak v. Corporate City of South Bend,* 750 F.2d 557 (7th Cir. 1984), *petition for writ of cert. filed,* 53 U.S.L.W. 3896 (U.S. June 10, 1985) (No. 84-1936) *citing Regents of the University of California v. Bakke,* 438 U.S. 265, 359 (1978) (Brennan, J. dissenting). Other courts have extended *Weber* to public employers, without considering affirmative action's validity under the Fourteenth Amendment. *La Riviere v. EEOC,* 682 F.2d 1275, 1279 (9th Cir. 1982).

[24]"Similarly, the Court approved the hiring program in *Steelworkers v. Weber,* 443 U.S. 193 (1979), in part because the plan did not 'unnecessarily trammel the interests of the white employees.' Since *Weber* involved a private company, its reasoning concerning the validity of the hiring plan at issue there is not directly relevant to this case, which involves a state-imposed plan. No equal protection claim was presented in *Weber.*" *Wygant v. Jackson Board of Education,* 54 U.S.L.W. 4479, 4483, n.9 (May 19, 1986).

scrutiny standard, considering whether the affirmative action plan, stated "a compelling government interest" and whether "the means chosen were 'narrowly tailored to the achievement of that goal.' "

This Court should also apply the strict scrutiny standard used in *Wygant* to review the Agency's voluntary affirmative action, because both Title VII and the Fourteenth Amendment forbid discrimination, except for narrowly construed exceptions based on past discrimination.[25] While agreeing with the use of strict scrutiny in *Wygant*, Justice O'Connor in a concurring opinion added that a public employer's voluntary affirmative action program must be based on a legitimate remedial purpose and be narrowly tailored to that purpose, so as not to impose disproportionate burdens on other employees. *Wygant v. Jackson Board of Education*, 54 U.S.L.W. at 4486 (O'Connor, J., concurring.)

Strict scrutiny is also mandated for a public employer's affirmative action plan, because classifications based on race and sex are equally unlawful under Title VII.[26]

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[25]This Court's decisions in *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1976) (holding random discrimination violative of Title VII) and in *Weber*, 443 U.S. at 200 (holding planned discrimination did not violate Title VII) can only be reconciled if any exception to Title VII's flat prohibition against discrimination is narrowly construed.

[26]Even assuming for purposes of argument that *Weber* applies to sex based affirmative action programs, it should be noted that the 1964 Civil Rights Act legislative history relied upon in *Weber*, provides for a more compelling basis for affirmative action on the basis of race than does the 1972 legislative history's discussion of the economic impacts of sex discrimination. Moreover, there is a strong tradition upholding race conscious remedies to eliminate the vestiges of past discrimination. *See Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971) (school desegregation); *United Jewish Org. v. Carey*, 430 U.S. 144 (1977) (voter distribution).

42 U.S.C. § 2000e-2(a) (1983); *City of Los Angeles v. Manhart,* 435 U.S. 702 (1978). In *Wygant,* this Court held that race based classifications in a voluntary affirmative action program are subject to strict scrutiny under the Fourteenth Amendment. Congress did not constitutionally lower that standard of review under Title VII as it applies to racial discrimination by a public employer. Therefore, the strict scrutiny standard must also be applied under Title VII to sex-based discrimination by a public employer under a voluntary affirmative action.

To apply a less strict standard of review to public employer affirmative action plans would lead to an anomalous result. An affirmative action plan might be valid as to sex-based classifications under the Fourteenth Amendment but invalid as to its racial classification, under the strict scrutiny standard applied in *Wygant,* even though the social basis for race-based affirmative action is much stronger than for sex-based affirmative action. This anomaly would also occur if this Court were to apply only "heightened scrutiny" used in Fourteenth Amendment sex discrimination cases in reviewing this plan. *Mississippi University for Women v. Hogan,* 458 U.S. 718, 724 (1982). Such anamolies can be avoided by applying strict scrutiny to all public employer affirmative action plans. This would also promote the underlying policies in Title VII and the Fourteenth Amendment, of prohibiting discrimination on the basis of race, color, religion, sex, or national origin by ensuring that any exceptions are very narrow.

II. AN AFFIRMATIVE ACTION PROGRAM SERVES NO LEGITIMATE REMEDIAL PURPOSE WHEN IT IS BASED SOLELY ON A NAKED STATISTICAL DISPARITY.

The District Court found as fact that "[t]he Transportation Agency has not discriminated in the past, and does not discriminate in the present against women in regard to employment opportunities in general and promotions in particular." Pet. App. 13a. The District Court also held that the plan's stated remedial purpose was insufficient.

> There is nothing in the County Plan, Exhibit 2, which is consistent with any temporary remedial purposes. * * * There is nothing on the face of Exs. 1 or 2 which tends to show that the adoption of the Affirmative Action Plan therein contained was prompted by concededly discriminatory practices committed in the past by the County or the Agency as distinguished from generally prevalent societal attitudes.

Pet. App. 8a-9a.

Judges Fletcher and Ferguson of the Court of Appeals did not set aside those findings as clearly erroneous. Nor could they have. Instead, the Court of Appeals held that the Agency's affirmative action plan had a valid remedial purpose based solely on general statistics showing that women were underrepresented in the Agency's work force. As stated by the Ninth Circuit, "[i]t is sufficient for the employer to show a conspicuous imbalance in its work force. * * * We note particularly the difficulty that may confront an employer whose plan is intended to remedy discrimination resulting from societal norms. * * * A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong

social pressures weigh against their participation. . . ." Pet. App. 26a-27a. The majority noted that the District Court's finding of no discrimination, past or present, was "irrelevant to the issue of the validity of the affirmative action program." Pet. App. 49a.

Judge Wallace disagreed in his concurring and dissenting opinion, stating:

> A judicial inquiry demands no official administrative or judicial determination of discrimination. . . . Nevertheless, the employer must be able to point to past or present discriminatory patterns or practices that created the traditional segregation of the job categories in question. Merely "arguable" violations are not enough. . . . Past discrimination implies some discriminatory cause for the present underrepresentation in the employer's job category and allows the court to go beyond the effects of socially created, accidental differences.

Pet. App. 42a-43a. (Citations omitted.)

A. Affirmative Action Can Only Be Justified Under Title VII to Remedy Actual Past Discrimination.

The Court of Appeals' conclusion that a mere statistical disparity constitutes a legitimate remedial purpose and that a showing of past discrimination is unnecessary is fatally flawed. Affirmative action programs adopted solely to remedy societal discrimination are impermissible. *Wygant v. Jackson Board of Education,* 54 U.S.L.W. at 4482. As Justice Powell explained in *Regents of the University of California v. Bakke,* 438 U.S. at 310, "To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at

their pleasure to whatever groups are perceived as victims of social discrimination. This is a step we have never approved."

In the absence of a legitimate remedial purpose, there is no compelling government interest that would justify the use of affirmative action. In *Wygant,* this Court repudiated a voluntary affirmative action plan adopted by a public employer that was intended to address solely societal discrimination, stating:[27]

> [s]ocietal discrimination without more is too amorphous a basis for imposing a racially classified remedy. . . . There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

Id. at 4482 (emphasis in original).

The obligations of a public employer to eliminate discrimination and yet do away with distinctions based on race (or sex) may not always be harmonious. However,

> a public employer like the Board must ensure that, before it embarks on an affirmative action program, it

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[27]While *Wygant* concerned a racial classification under the Fourteenth Amendment, subject to strict scrutiny, the constitutional prohibition against race conscious schemes to remedy societal discrimination applies with equal force to a public employer's voluntary affirmative action under Title VII.

> has convincing evidence that remedial action is warranted. That is it must have sufficient evidence to justify the conclusion that there has been prior discrimination.

Id.[28]

An employer cannot rely on statistics alone and thereby avoid critical evaluation and analysis. *See United States Commission on Civil Rights, Affirmative Action in the 1980's: Dismantling the Process of Discrimination* 41 (1981). Instead, an employer needs a compelling reason to violate the general prohibition against discrimination in employment.

The fatal flaw in the Court of Appeals' analysis is that it lost sight of the purpose of Title VII. Congress did not grant any power in Title VII to the states to pursue invidious methods of discrimination to achieve arguably socially beneficial goals. Title VII is an anti-discrimination statute.

There is no evidence that Congress intended to preclude state and local government from eliminating discrimination through constitutionally valid means, which could include racial considerations. But, under the Ninth Circuit's reasoning, Title VII becomes a grant of power to states to engage in blatant discrimination that would have been clearly unconstitutional before 1964 and 1972. There is no support in the legislative history to support such a construction of the Act.

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[28]Justice O'Connor concurred in this portion of the plurality opinion, noting only that contemporaneous findings of past discrimination were not required to support an affirmative action program. *Wygant* at 4486-4487.

Other courts have rejected affirmative action programs based solely upon a statistical disparity. In *Valentine v. Smith*, 654 F.2d 503, 508 (8th Cir. 1981), the court wrote, "[a]bsent findings of past discrimination, courts cannot ascertain that the purpose of the affirmative action program is legitimate. Such findings enable courts to ensure that new forms of invidious discrimination are not approved in the guise of affirmative action." At least one court has held that a voluntary affirmative action plan adopted by a public employer based on mere statistical disparity was invalid.

> [E]vidence of statistical disparity alone fails to prove past discrimination and cannot justify the adoption of a remedial plan that may discriminate against nonminorities. Even the four dissenters in *Bakke* seem to agree that the government needs to proffer something more than statistical evidence of a disparity between the percentage of minorities employed and the percentage of minorities in the population to prove past discrimination[.]

Janowiak v. Corporate City of South Bend, 750 F.2d 557, 564 (7th Cir. 1984), *citing Bakke* at 369 (Brennan, J., dissenting).

B. The Agency's Affirmative Action Plan Was Not Adopted to Remedy Any Past Discrimination and Is Therefore Invalid.

Notwithstanding the requirement that any affirmative action plan be intended to address actual discrimination, the Agency adopted its affirmative action program based solely on a statistical disparity. The testimony of the Agency Director and the Personnel Officer and the two affirmative action plans establish that the statistical

disparity in the number of women employed by the Agency in Skilled Craft and Service and Maintenance job classifications was the result of factors beyond the control of the Agency, and not due to any past pattern or practice of discrimination. County Personnel Officer Thomas testified that the statistical underrepresentation was due in part to the fact that women had never trained for and were not interested in such work.[29] For this reason, she believed that the underrepresentation of women was not due to any Agency misdeeds, RT, Vol. II, 277:5-6, and that the goals of statistical parity were "unrealistic."

> Q: (DAWSON) Did you ever comment to anyone in the Transportation Agency that that [36.4% women] was an unrealistic goal?
>
> A: (THOMAS) Yes, for some categories.
>
> Q: (DAWSON) Which categories did you think that was an unrealistic goal for?
>
> A: (THOMAS) I thought it was unrealistic for skilled craft, probably, some of the other service areas, non-traditional kinds of things. Engineers.
>
> Q: (DAWSON) It was unrealistic for non-traditional jobs because in connection with women, because women didn't express an interest in those jobs, or what?
>
> A: (THOMAS) For both women and minorities. Women had not expressed interest in them. Perhaps, just by tradition, had never trained for some of the jobs. Not unusual.

RT, Vol. II, 263:6-20.

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[29]Thomas' testimony about the plan is entitled to substantial weight because the plan places primary responsibility for its implementation on the Personnel Office. J.A. 34.

In the "Work Force Utilization Analysis" the Agency's plan stated:

> Women are also greatly underrepresented in Agency job classifications in other than the bus maintenance field.[30] Generally, most of this underrepresentation exists in job classifications where women have not been traditionally employed in significant numbers.

J.A. 51.

In identifying "Factors Hindering Goal Attainment," the plan stated:

> Many of the Agency positions where women are underrepresented involve heavy labor; *eg.*, Road Maintenance Worker. Consequently, few women seek entry into these positions.
>
> • • •
>
> Many women are not strongly motivated to seek employment in job classifications where they have not been traditionally employed because of the limited opportunities that have existed in the past for them to work in such classifications.

J.A. 56-57.

Certainly the plan and the testimony of the Agency's employees show that the statistical disparity was based on societal attitudes and was not the result, in whole or in part, of any past or present Agency misdeeds. Affirma-

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[30]The plan notes that training prerequisites, such as mechanic training for the bus maintenance position in the Transit Division, may have limited entry to those jobs. No comparable prerequisite applied to the job of Road Dispatcher. J.A. 56, 59.

tive action on these facts lacked any legitimate remedial purpose and is unlawful.

In light of the District Court's express finding that "[t]he Agency did not discriminate in the past, and was not discriminating in the present against women[,]" Pet. App. 13a, it is difficult to find any remedial purpose in the plan. The District Court's analysis of the testimony on the absence of past or present discrimination is controlling. First, the District Court noted that the Agency Director testified that no woman had filed a complaint alleging sex discrimination. Pet. App. 9a. Second, the District Court analyzed Joyce's testimony because the Agency relied on her testimony as the predicate for arguing the existence of past discrimination. The District Court concluded that Joyce's testimony on the issue of discrimination was entitled to little weight because "[t]here is no evidence in the record that Joyce was denied assignment as a Road Maintenance Worker because she was a woman." The denial of coveralls "may be indicative of discriminatory intent on the part of Mr. Baldanzi, but by itself does not constitute adequate proof of historical justification for an Affirmative Action Plan." Pet. App. 9a. The District Court also noted that the grievance process addressed such incidents and "I do not feel that these incidents tend to show that the plans were adopted to break down 'old patterns of segregation and hierarchy.'" Pet. App. 9a.

Based on the above findings by the District Court, left undisturbed by the Court of Appeals, there was no evidence of past practices or patterns of discrimination that merited the use of the affirmative action plan and there was no other basis to claim any remedial purpose.

This absence of past practices or patterns of discrimination against women meant that the plan merely addressed societal attitudes and attempted to reach statistical parity.[31] This alone cannot give the plan a legitimate remedial purpose that would be a basis for finding a compelling state interest.

III. EVEN IF THE AFFIRMATIVE ACTION PLAN WAS SUPPORTED BY A COMPELLING OR EVEN IMPORTANT STATE INTEREST, IT IS NOT NARROWLY TAILORED TO CONSIDER ANY LESS RESTRICTIVE ALTERNATIVES AND IT UNNECESSARILY TRAMMELS INDIVIDUAL RIGHTS.

A. The Agency's Affirmative Action Plan Imposes Disproportionate Burdens on The Individual Employee Who is Not a Member of a Protected Class and Unnecessarily Trammels His Rights.

The plan was not narrowly tailored to avoid imposing disproportionate burdens on other employees and unnecesssarily trammeled their rights. The Court of Appeals incorrectly held that it was unnecessary to consider whether the plan unnecessarily trammeled Petitioner's rights.

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[31]As argued above, the affirmative action plan should be judged under the compelling state interest standard. However, the outcome would not be different if the Court applied the important state interest standard used in Fourteenth Amendment sex discrimination cases. *See Craig v. Boren,* 429 U.S. 190 (1977); *Reed v. Reed,* 404 U.S. 71 (1971). Eliminating statistical disparity in job classifications when the numbers are the product of self selection rather than employer discrimination is not a weighty justification for blatant sex discrimination.

Also, as discussed in the next section, the Agency's plan as applied is not tailored to prevent harm to innocent male employees. The plan does not satisfy the requirement that it must be substantially related to the achievement of the Agency's purpose. *Craig v. Boren.*

The Ninth Circuit stated: "[T]he instant case differs markedly from *Weber* and *La Riviere* in that it does not involve the admission of numerous applicants into a training program. Rather, it concerns the selection of one applicant for a single opening. When there is but one opening, the selection of one candidate will necessarily result in exclusion of all others." Pet. App. 28a.

The impact of the affirmative action plan on Petitioner's rights, by denying him a promotion, is precisely what makes this plan unlawful. In *Wygant,* this Court held that affirmative action for one group at the expense of the individual is only lawful if there is a compelling government interest and the means are narrowly tailored.[32] Even under *Weber,* remedial burdens imposed upon innocent third parties are only justified when they are diffused among many persons or have minimal impact. *See Wygant* at 4483, n.9; *Local 28 Sheetmetal Workers v. EEOC,* 54 U.S.L.W. 4984, 5000 (U.S. June 24, 1986).

The legislative history of the 1972 amendments to the Civil Rights Act that extended Title VII to public employers shows that non-minority employees were to be equally protected from discrimination:

> While discrimination because of race, color, religion, national origin, or sex is the thing specifically prohibited, the existing law, (Title VII of the Civil Rights Act of 1964) protects every individual in this country. Whites, no less than black workers, may in some instances be discriminated against as is alleged in "re-

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[32]An affirmative action plan should impose only those burdens directly related to the identified remedial purpose. *Parker v. Baltimore & O.R.R. Co.,* 652 F.2d 1012 (D.C. Cir. 1981).

> verse discrimination'' on men as well as women. The prohibited acts may not be committed against ''any individual'' as the law specifies throughout Title VII.
>
> Discrimination in employment violates our concepts of justice and equality as expressed in the Declaration of Independence, our constitution, and the Civil Rights Act of 1964. The only legal room for disagreement is the means of implementing the national policy.

Legislative History at 205.

Here, Petitioner was denied a well-earned promotion solely on account of his sex.[33] The District Court expressly found that Petitioner was the best qualified candidate for the job and that ''[b]ased upon the testimony of Graebner, Ex. 13, and the whole chronology of events as described by plaintiff, Joyce, and other witnesses, I am satisfied by a preponderance of evidence that the gender of Joyce was *the determining factor* in her selection.'' Pet. App. 4a.

Petitioner had just missed being promoted to Road Dispatcher in 1974 by placing second in the examination process. RT, Vol. I, 129:6-11. Rather than be denied again, Petitioner went out on the roads, because experience as a Road Maintenance Worker II was relevant to the job of Road Dispatcher. RT, Vol. I, 128:12-19. This was a demotion and required hard physical labor. RT, Vol. I, 127:13-20. He waited five years to compete for the next opening for Road Dispatcher because there were only two Road Dispatchers in the Agency and no opening occurred until 1979. Petitioner did well in the interviews and

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[33]This is a classic case of disparate treatment under Title VII even though Johnson is a white male. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Tex. Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 251 (1981).

was unanimously recommended. Just when Petitioner believed that the promotion was his, the Director of the Agency reversed the recommendation of the Roads Division Superintendent,[34] who would normally have made the appointment, without any serious attempt to compare the candidates' qualifications, and appointed Joyce on the recommendation of the Affirmative Action Officer. If Petitioner had not been aided by the District Court's order, he would have retired without ever having been promoted, even though he was clearly the most qualified candidate.

There were no new jobs in the Agency, except for the Transit Division,[35] whose bus fleet grew significantly.[36] The plan noted that 734 new jobs were authorized by the Board of Supervisors to further enlarge the bus fleet. J.A. 59. However, no similar increases in positions were planned for other Agency divisions. J.A. 59-60.[37] In fact, Proposition 13 was expected to require cutbacks. J.A. 61. Budget constraints and low turnover made the use of affirmative action that much more burdensome on the unprotected employees. The plan noted that these factors

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[34]RT, Vol. II, 94:11-25, 95:1-2.

[35]The Agency was comprised of six divisions, including the Roads Division and the Transit Division.

[36]According to the plan, the new jobs in the Transit Division pertained to the expansion of the bus fleet and accounted for much of the increases in female (8.5% to 22.4%) and minority (11.3% to 31.6%) representation between 1973 and 1978. J.A. 45, 49.

[37]The Ninth Circuit's statement that there were new positions misread the record, because none of the new jobs applied to the Roads Division or this promotion. Pet. App. 59-60a.

made it difficult to meet the goal of statistical parity. J.A. 59-61.

The plan also trammels on the rights of the unprotected employees[38] by not differentiating between entry level and promotions or layoffs. This unfairly disrupts the expectations of the unprotected employees because their experience and performance will not necessarily count when competing for a promotion since the goal of statistical parity applies to each and every job. In *Wygant*, this Court held that voluntary affirmative action cannot justify racially based layoffs of more senior employees. While this is not a layoff case, the same expectations and unfairness apply here. Johnson had worked for the County since 1967. He had been working toward that promotion for five years only to have the promotion denied him in the name of affirmative action.

The Director's "leap frogging" of Joyce over Johnson crossed the line between permissible and impermissible affirmative action.[39]

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[38]Beals, the interim Affirmative Action Coordinator, testified that white males were not members of protected groups and would never receive special consideration pursuant to the plan. RT, Vol. II, 234:16-24.

[39]The legislative history shows that Congress did not intend to authorize "leap frogging."

> There are those who would make H.R. 1746 appear as a scheme to allow blacks to leapfrog over others at the expense of white workers. Not only does this ignore the entire issue of sex discrimination, which involves more white than black women, but it overlooks entirely the experiences already recorded in the 32 states with cease-and-desist enforcement power where past dire predictions have been proved entirely false.

Legislative History 204, 255.

The facts show that the plan's goals of opening opportunities and removing barriers to employment had in fact occurred. J.A. 31. Joyce was not denied entry into the job of Road Maintenance Worker II. The District Court expressly found that she had never been denied an assignment in that position. Pet. App. 4a. Special training was never required for Road Dispatcher, although experience in road maintenance was believed to be relevant. J.A. 24. Consequently, Graebner's reliance on the fact that no women were employed in the Skilled Craft Worker job classification as a basis for promoting Joyce was misplaced. The reasons identified in the plan for the overall lack of women in Skilled Craft Worker positions had nothing to do with the position of Road Dispatcher.[40]

The unfairness to Petitioner is only underscored by the fact that the job was misclassified. The Director testified that the Transit Division dispatcher job was classified as Office and Clerical, which was not underrepresented by women. RT, Vol. I, 32:9-19. When asked to identify the special manual skill required for Road Dispatcher, Graebner could only offer "operating office equipment." RT, Vol. I, 32:20-21. Neither the District Court nor the Court of Appeals addressed this issue.

No barrier existed with respect to the Road Dispatcher job other than experience. J.A. 24. The requirement of experience was sex neutral here. Johnson had worked for 17 years for Pacific Cement and Aggregate Company as a dispatcher. He had worked for another 13 years for the

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[40]The plan noted that many positions in the Skilled Craft Worker classification required special training, e.g., mechanics for bus maintenance. J.A. 56. The Agency instituted a training program to address this entry level prerequisite. J.A. 50, 77.

Agency. By the time that he was competing for this job, he had more experience and by virtue of this experience was more qualified. The Director's blind adherence to numerical goals resulted in the appointment of the less qualified woman to a job having no sex-based barriers in the first place.

B. The Plan Is Not Narrowly Tailored to Consider Less Restrictive Alternatives.

There is nothing in the affirmative action plan to indicate any effort to narrowly tailor the actions to be taken. The plan only addressed the rights of protected classes, which are defined as

> legally identified groups that are specifically protected by statute against employment discrimination. Unlike "affected class" which must be demonstrated, protected class status is automatically conferred upon recognized minority group members, females, disabled, by virtue of the law or other court decisions interpreting the law.

J.A. 130.

As the interim Affirmative Action Officer testified, the employees who are not members of protected classes are "unprotected," having no rights under the Civil Rights Act, as it is administered by the Agency.[41] RT, Vol. II, 243:16-24.

The plan stated as its major premise that it was not sufficient to provide equal opportunity "to remedy the effects of past discrimination" but that "affirmative aggressive and continuing actions are necessary." J.A. 31, 54, 65.

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[41]The plan's exclusion of employees who are not members of a protected group violates the premise that Title VII protects all individuals. *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1976).

The plan's objective was to "reflect the ethnic and sexual make-up of the area work force." J.A. 31, 34, 38, 54, 112, 113. To achieve this mirror image of the county work force, the plan sought statistical parity for each job in the Agency and set as its employment goal 36.4% women in each job. Statistical parity started with the Agency as a whole, then each EEOC job category,[42] and finally each of the County's 118 job classifications. J.A. 38, 54. The figure 36.4% was based on the 1970 census data reflecting the number of women in the work force. J.A. 54. This goal was never changed from its first appearance in the County's 1972 Affirmative Action Plan. J.A. 38, RT, Vol. II, 241:12-24.

The employment goal of 36.4% in the plan was not based on the number of women in the County work force who were potentially qualified for the underrepresented job categories. This figure did not take into account women who had specific training, *e.g.*, teachers, paralegals, nurses, lab technicians, etc., and who would not be likely to change careers for a nontraditional job with the Agency.

The Agency's Personnel Officer correctly testified that the goals were unrealistic. RT, Vol. II, 262:6-20. She also testified that the County had no way of maintaining reliable statistics on the number of applicants and their qualifications, because the County lacked computer capacity. RT, Vol. II, 272:8-11.

The employment goal (36.4% women) for the Roads Division was the same as that for the Transit Division,

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[42]EEOC guidelines include skilled craft worker, technician, protective services worker, para-professional, professional, official and administrator, office and clerical, and service and maintenance job categories. J.A. 58-59.

which had added hundreds of new positions. J.A. 58-60. The plan conceded that it was difficult to set goals for jobs with less than 3 people, J.A. 56, and yet 70 of the County's 118 job classifications had less than three people, including the position of Road Dispatcher. Here there were only two Road Dispatcher positions. With Joyce's appointment to the Road Dispatcher position, it was 50% female.

The plan placed substantial if not overriding emphasis on the Agency managers to increase female representation. The Board of Supervisors "charges and holds the County Executive accountable for developing, implementing and administering" an Affirmative Action Plan. J.A. 113. The County Executive, in turn, holds each Director "personally responsible" and "[t]he degree to which each Agency Division attains the Plan's objective will provide a direct measure of that Division Director's personal commitment to the EEO Policy. . . ." J.A. 35. The Board "will consider the commitment to and results attained by each Department/Agency Director in carrying out the Board of Supervisors EEO Policy as an important element in evaluating their effectiveness as managers." J.A. 114, 120.

Eliminating underrepresentation of women in the Agency was a priority, J.A. 51, and the results from affirmative action were to be statistically measurable. J.A. 35, 114. A manager or director had to report his progress in reaching the numerical goals each year to the Board of Supervisors. J.A. 74. Whenever he did not hire a member of the protected class, he had to submit a written explanation of his reasons. J.A. 61, 79.

While the plan admonished its employees not to treat the goals as quotas, the testimony and the plan prove that

the goals were used to discriminate as if they were quotas.[43] The Agency Director testified that Morton intervened as the Affirmative Action Director to recommend that Joyce be promoted because she was the only applicant within a "protected class." Pet. App. 19a.

> Q (DAWSON) Mr. Morton felt that Diane Joyce should be appointed?
>
> A (GRAEBNER) Mr. Morton *was less interested in the particular individual;* he felt that this was an opportunity for us to take a step toward meeting our affirmative action goals, and because there was only one person on the list who was one of the protected groups. He felt that this afforded us an opportunity to meet those goals through the appointment of that member of a protected group.

RT, Vol. I, 18:1-8 (emphasis added).

Graebner testified that he too viewed the promotion as making a small dent in the numbers. RT, Vol. I, 64:10-12. The plan's provisions illustrate the pressure placed on the Agency managers to meet their numerical goals regardless of the impact on the unprotected employees. Graebner's testimony stands as a graphic example of an administrator's response to such pressure.

In this case, an Agency manager had little discretion not to award a job to a member of a protected group, if one were on the list. The absence of new positions and the low turnover made it very unlikely that an "unprotected" employee would get a promotion when it was so difficult for the Agency to meet its affirmative action goals. Even

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[43]The plan stated that these goals "should not be construed as 'quotas' that must be met" but "should rather be seen as realistic desired levels of achievement correcting imbalances in a Division's work force." J.A. 64.

though the plan recognized many of these problems, its only response was that given the low turnover and lack of new jobs, it was even more important to give protected employees special consideration. J.A. 60.

IV. EVEN IF WEBER WERE APPLICABLE TO THIS CASE, THE AFFIRMATIVE ACTION PLAN IS UNLAWFUL UNDER THAT DECISION.

Even if this Court finds that the Agency's affirmative action plan can be reviewed under the same standard as that of a private employer in *Weber*, it is clear that the Agency's affirmative action plan is still unlawful. The Court of Appeals expanded the narrow exception for voluntary affirmative action in *Weber* far beyond its permissible boundaries. The Court of Appeals' decision would permit not only plans with no legitimate remedial purpose but also plans which impose disproportionate burdens on other innocent employees and trammel their individual rights unnecessarily. Even a plan with a legitimate remedial purpose must be substantially related to remedying past discrimination and any remedies used must be narrowly tailored. *Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012 (D.C. Cir. 1981). The pressure to have affirmative action, often well-intentioned, makes it imperative that such voluntary plans be reviewed with the presumption that they are not lawful unless there is a legitimate remedial purpose and the means used are narrowly tailored and do not unnecessarily trammel the rights of individual employees.

In *Weber*, this Court created a narrow exception to Title VII's explicit prohibition of discrimination on the

basis of race.[44] The rationale was that the use of race in a private employer's voluntary affirmative action plan mirrored Congress' purpose of encouraging voluntary efforts to end discrimination.[45]

Here there was no past discrimination to remedy. The lack of new positions, the low turnover in the Roads Division of the Agency, and the unrealistic employment goal for women all combined to impose significant hardship on any unprotected employee. There was no diffusion of the burdens because the goals applied to every job in the Agency. Unlike the plan in *Weber*, there was no dual list that allocated half of the job training slots to nonminority employees. So long as a minority or a woman applied for the job of Road Dispatcher, Johnson or any other unprotected employee would be denied the promotion. The plan made no distinction between hiring and promotions or transfers. The unrealistic nature of the employment goal and the scope of the plan created an absolute bar to promotion for Johnson or any other unprotected employee when competing with a protected employee.

Moreover, the plan had no discernible end. The District Court relied substantially on the testimony of the

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[44]Since *Weber* did not involve a public employer, the Fourteenth Amendment was not a consideration. However, under Title VII, race and sex are treated equally.

[45]In *Weber*, the Court did not address what is impermissible, holding that the plan was designed to break down old patterns of racial segregation and hierarchy, the plan did not unnecessarily trammel the interests of the white employees, or create an absolute bar to the advancement of white employees, and it was temporary, with no intent to maintain racial balance. *Weber*, at 208.

Agency Director in so finding. Pet. App. 7a. Graebner testified that the affirmative action plan applied until each and every job met its goal, that the plan was a permanent part of the agency's operating philosophy, and that there was no specific time table. RT, Vol. I, 49:4-14, 23-25, 50: 1-4, 23-25, 61:18-21.

Neither the County nor the Agency employees charged with administering the program could agree on whether the plan ended, and if so, when it would end. The Director testified that he saw the affirmative action plan as a permanent part of personnel decisions in the Agency. RT, Vol. I, 61:18-21. His testimony was never rebutted by other witnesses. The interim Affirmative Action Officer testified that she believed that the plan would expire when the goals were met. However, she could not point to a single document stating that policy. RT, Vol. II, 241:22-25, 242:1-7, 23-25, 243:1-15. The Personnel Officer stated that she thought that the Plan lasted for 5 years. RT, Vol. II, 272:21-25. This confusion is understandable, since the plan used the word "Continuous" as the timetable for each goal, responsibility, and task and never stated when it would end. J.A. 61-96. This divergence of understanding about a key provision in the plan shows that there was no end date for the affirmative action plan. It is disingenuous to call this plan temporary. Given the unrealistic and probably unattainable employment goals for women, the plan was temporarily permanent.

The Court of Appeals in its amended opinion did not disturb the District Court's finding of fact that the plan had no end date. Instead, the court held that the finding of fact was irrelevant. Pet. App. 49a. This as-

sumption contradicts the guidance provided in *Weber* and impermissibly increases the burden on the "unprotected" employees, who have no way of knowing how long their job rights will be adversely affected in the name of affirmative action. Without an end date, a so-called remedial measure is indistinguishable from a permanent employment policy.

While this appeal does not address the racial preference in the plan, the Agency's treatment of its racial employment goal implies an intent to maintain rather than merely attain a racial balance. Between 1974 and 1979, the percentage of minority employees increased to the point that it exceeded the goal. However, the Agency retained its hiring goals to ensure that statistical parity would be achieved in every job classification. J.A. 36. Presumably, if the number of minorities had dropped through layoffs or other cutbacks, the affirmative action plan would apply again in order that statistical parity be achieved in each job. Otherwise the Agency would not meet the plan's goal of having its work force mirror the ethnic and sexual composition of the work force in the entire county.

The affirmative action plan does not meet any of the concerns raised by this Court in *Weber* and thus, the plan cannot excuse the Agency's unlawful discrimination.

V. PETITIONER CONCLUSIVELY PROVED THAT THE COUNTY INTENTIONALLY DISCRIMINATED AGAINST HIM AND THAT THE AFFIRMATIVE ACTION PLAN IS NOT A LEGITIMATE REASON FOR SUCH DISCRIMINATION.

Just as *Weber* does not govern the review of the affirmative action plan, this Court's decision in *McDonnell*

Douglas Corp. v. Green, 411 U.S. 792 (1973), offers no guidance as to the correct allocations of proof and the burdens of persuasion in this case. Judge Wallace identified precisely this problem in his concurring and dissenting opinion, arguing that he would vacate the decision and remand the case to the District Court because the findings of fact were insufficient and allocations of burdens of persuasion were incorrect. Pet. at 32a. Although not completely clear from the opinion, the District Court seemed to apply the *McDonnell Douglas* approach to this case. Any error was clearly harmless and remand is unnecessary.

In *McDonnell Douglas,* the Court established the procedure to determine whether an employer considered an impermissible factor in making an employment decision when there is no direct proof of intent to discriminate. This test does not apply here, because there was overwhelming evidence that Joyce was selected on account of her sex. Moreover, the Agency argued, as a separate defense, that "it acted legally in affirmatively placing women in positions traditionally held by men[,]" J.A. 13, and bore the burden of proving that defense.

The District Court found that "Based on the examination results and the departmental interview, plaintiff was more qualified for the position of Road Dispatcher than Diane Joyce." Pet. at 12a. The District Court explained that this finding was based on

> the testimony of Plaintiff, Joyce, Davis, DiBasilio, and Beals. Graebner's testimony that the applicants are essentially equal in qualification is not compelling because he appeared to rely primarily upon the posted scores, and did little or nothing to inquire into the results of the interview process and conclusions which

Beals described as of critical importance to the selection process.

Pet. App. 3a.[46]

The Agency Director admitted that sex was a factor in Joyce's promotion, but claimed that he "looked at the whole picture." RT, Vol. I, 68:14-25, 69:1-24. However, when questioned closely Graebner admitted that he did not examine the applications, the results of the two interviews, or the applicants' files. RT, Vol. I, 18:12-24. The Director admitted that he had no basis for distinguishing between Joyce and Petitioner in making the promotion decision other than sex. Based on this testimony, the District Court determined that sex was the determining factor, Pet. App. 14a, and the Court of Appeals did not disturb this finding of fact. Pet. App. 20a. The evidence of intentional discrimination was direct and for all practical purposes uncontroverted.

When the Agency asserted that the promotion was pursuant to a bona fide affirmative action plan, it bore the burden of proving its defense. The Agency, using the plans, exhibits, and the same witnesses called by the Petitioner, attempted to establish that the affirmative action plan met the guidelines set forth in *United Steelworkers of America v. Weber*, 443 U.S. at 200.

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[46]Beals, the interim Affirmative Action Officer testified that she would have determined who was best qualified based on an interview process such as was used here. RT, Vol. II, 234:6-22.

As stated by Judge Wallace, the defense of a bona fide affirmative action plan is really an affirmative defense and the employer should be obligated to prove it. This conclusion is contrary to the majority decision of the Court of Appeals which used *McDonnell Douglas* to find that the employer need only offer some evidence that the plan is valid for it to serve as a complete defense. This forces the complainant to show not only that he was the victim of discrimination but also that the affirmative action plan is *per se* invalid.

This burden is inappropriate. First, the affirmative action plan is by its very nature discriminatory. Hence, it is not a "legitimate nondiscriminatory reason" under § 703(h). Second, because it classifies employees on an otherwise illegal basis, the presumption should be that affirmative action is unlawful and the employer should as a matter of policy carry the burden of showing that it is not unlawful in these circumstances.

Should this Court determine that *McDonnell Douglas* is controlling, the record, as discussed *ante,* proves that Petitioner successfully carried its ultimate burden of showing that the Agency had no legitimate nondiscriminatory reason for selecting Joyce over Petitioner for the job of Road Dispatcher. The record shows that the plan was never based on past or present patterns or practices of discrimination that would give the plan a remedial purpose. Moreover, the record shows that the plan unneces-

sarily trammeled the rights of unprotected employees by not being temporary.

The District Court specifically applied the *McDonnell Douglas* decision to find that the Petitioner had established that the Agency plan did not meet the *Weber* guidelines as to its temporary nature and was intended to maintain given work-force percentages.

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CONCLUSION

When examined under the strict scrutiny standard of the Fourteenth Amendment, the Agency's affirmative action plan lacked any compelling or substantial government interest, because there was no evidence of past patterns or practices of discrimination. A naked statistical disparity, apparently the product of societal attitudes, is not an adequate predicate to give the plan a remedial purpose. Even if the Agency had established a compelling (or substantial) governmental interest, the plan is still invalid because it was not narrowly tailored to avoid unnecessarily trammeling the rights of unprotected employees, like Petitioner. The plan's across the board preference for women applied to each job, notwithstanding the lack of new positions and low turnover. The operative effect of the plan was to bar unprotected employees from advancement. These characteristics, when coupled with the lack of an end date and intent to maintain the goals once achieved, also render this plan invalid under the

Weber guidelines. For these reasons, Petitioner urges this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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